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IN THE
Supreme Court of the United States

October Term—1921

No. **67**

THE STATE OF OHIO, EX REL. ALLEN J.
SENEY, PROSECUTING ATTORNEY
OF LUCAS COUNTY, OHIO,

Appellant,

vs.

SWIFT AND COMPANY AND THE NORTH-
ERN REFRIGERATING COMPANY,

Appellees.

Brief on Behalf of Appellant

ROY R. STUART,
Prosecuting Attorney,
Lucas County, Ohio,

ALLEN J. SENEY,
Special Counsel,
Solicitors for Appellant.

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BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE

This action was brought by the State of Ohio as plaintiff on relation of Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, against Swift and Company and The Northern Refrigerating Company,

in the Court of Common Pleas of Lucas County, Ohio, wherein the plaintiff, The State of Ohio, alleged in substance that Swift and Company had stored a certain quantity of whole pork carcasses and parts thereof with The Northern Refrigerating Company, in violation of the Valentine Anti-Trust law and the Smith Cold Storage Act, both penal statutes of Ohio, and claiming that Swift & Company and The Northern Refrigerating Co. entered into an agreement to and did in fact create and carry out certain restrictions in trade and commerce, in violation of said State statutes, by reason of the storage of said pork as aforesaid; and said The State of Ohio prayed is said action for an injunction preventing the removal from said warehouse by Swift and Company or The Northern Refrigerating Company of said pork; prayed for the appointment of a receiver, and that an injunction issue restraining said defendants from further carrying out any other and further restrictions in trade and commerce, in violation of said State statutes, or either of them.

The petition was filed on or about August 27th, 1919, as cause Number 80910 in the Court of Common Pleas of Lucas County, Ohio. The record in this case will disclose that a temporary retaining order was issued the same day the petition was filed against Swift and Company and The Northern Refrigerating Company, restraining them from removing said pork, or

any part thereof; that on the following day, to-wit, August 28th, 1919, on the motion of the State of Ohio plaintiff, a receiver was appointed for said pork; and on the same day notice was personally served on said defendants, Swift and Company and The Northern Refrigerating Company, of the hearing of said motion; that on September 2nd, 1919, said Swift and Company filed its petition for removal and bond with the clerk of the Court of Common Pleas of Lucas County, Ohio, and served notice of the filing thereof on said plaintiff, by leaving a copy thereof with Allen J. Seney, Prosecuting Attorney; that on September 3rd, 1919, pursuant to said notice of the hearing of said motion for an order to sell said pork, said parties were in court, and on application of the plaintiff the presentation of said petition for removal and the hearing of said motion to sell said pork was continued until September 5th, 1919; that on September 5th, 1919, and before the presentation of said petition for removal to said court, said plaintiff, The State of Ohio, in open court, voluntarily dismissed without prejudice, under the statutes of Ohio in such cases provided, said Swift and Company from said action; that thereafter, towit, on September 11th, 1919, said Swift and Company filed a transcript of the proceedings in said Common Pleas Court, in the United States District Court for the Northern District of Ohio, Western Division, and had said transcript of

said proceedings entered on the dockets of said District Court as Equity Cause Number 222; that on September 12, 1919, a motion was filed by the State of Ohio to remand said cause to said Court of Common Pleas for the reason that said cause was not "a removable cause" within the provisions of the Federal Statute providing for the removal of causes from a State Court to the Federal Court, and that said Federal District Court was without jurisdiction to entertain said action; that on October 1, 1919, said motion to remand said cause was by said Federal District Court overruled; that said District Court thereupon, over the objection of said The State of Ohio, proceeded to receive and hear evidence on behalf of Swift & Company on the motion of Swift & Company theretofore filed for an order releasing said pork from the custody of said receiver and turning the same over to Swift & Company; that on October 6, 1919, Swift & Company, at the suggestion of the District Judge of said United States District Court for The Northern District of Ohio, Western Division, filed a motion for judgment, and on October 8th said District Court and the Juldge thereof, John M. Killits, granted said motion for judgment, discharging the injunction theretofore issued by said Court of Common Pleas and discharging the receiver therefore appointed by said Court of Common Pleas, decreeing the custody and

control of said pork to be in Swift & Company and dismissing said petition, assessing all costs against the appellant herein; to which orders and decrees of said Federal District Court of the Northern District of Ohio, Western Division, the appellant duly excepted, and thereafter prosecuted an appeal to the United States Circuit Court of Appeals, Sixth Circuit, which said Circuit Court, in an opinion filed January 17, 1921, affirmed the decree and order of said Federal District Court.

The action was dismissed in the Court of Common Pleas as to Swift and Company under the provisions of *Section 11586 of the General Code of Ohio*, so much of which as is pertinent is as follows:

"An action may be dismissed without prejudice to a further action;

1. By the plaintiff before it is finally submitted to the jury, or to the Court, when the trial is by the Court:"

SPECIFICATION OF ERRORS

The appellant contends that the United States Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree and order of the United States District Court for the Northern District of Ohio, Western Division, for the following reasons:

FIRST. That said Federal District Court for the Northern District of Ohio had no jurisdiction of the

parties or the subject matter of the original action commenced in the Court of Common Pleas of Lucas County, Ohio, being number 80910, in which said action The State of Ohio was the plaintiff and one Swift & Company and The Northern Refrigerating Company were defendants, in that there was no diversity of citizenship giving said Federal District Court jurisdiction of said action, in which said original action number 80910, The State of Ohio was seeking to enforce, in the Court of Common Pleas of Lucas County, Ohio, against Swift & Company and The Northern Refrigerating Company the provisions of two penal statutes of the State of Ohio, commonly known as the Valentine Anti-Trust Law and the Smith Cold Storage Law, and with relation to the enforcement of which said Federal District Court had no jurisdiction.

SECOND. That the said District Court erred in refusing to remand said cause number 80910 to the Court of Common Pleas of Lucas County, Ohio.

ARGUMENT

There is but one question involved in this appeal and it was so found by the Court below (see Rec. 96-97 "*The Laws of the United States*", "*Denial of Civil Rights*", *Diverse Citizenship*"). It may be stated in this way: Did the Federal District Court under the laws of the United States have the right and power to

assume, entertain and exercise jurisdiction in said cause number 80910, docketed as equity cause number 222 in said Federal District Court for the Northern District of Ohio, Western Division, and attempted to be removed from the Court of Common Pleas of Lucas County, Ohio, to said Federal District Court?

In the opinion of the Court below the Court, in its statement of facts, in the very first paragraph thereof, refers to Sections 6390-6402 of the Ohio General Code, which that court say authorizes the attorney general or prosecuting attorney of the proper county to "institute proper proceedings in quo warranto, injunction or otherwise, by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited". Yet the court below complains that there is no allegation in the petition which authorizes Allen J. Seney as Prosecuting Attorney of Lucas County, Ohio, "to cause the State to sue * * *".

This Court will at once observe (which the Court below obviously overlooked) that this cause was originally brought in the Court of Common Pleas of Lucas County under the laws of the State of Ohio by the "duly elected, qualified and acting Prosecuting Attorney of Lucas County, Ohio", and that it was not necessary to allege in the petition filed in the State Court the express authority of the State to bring such an action, although if that action could have been com-

menced in the Federal Court such an allegation would perhaps have been necessary.

Attention is called to the quotation of Section 2916 of the General Code of Ohio as it appears hereafter in this brief, which specifically authorizes the prosecuting attorney to "*prosecute on behalf of the State* all complaints, suits and controversies in which the State is a party."

A District Court Has No Jurisdiction of an Action Brought by a State and Based on the Penal Statutes of a State.

The action filed in the Court of Common Pleas as Number 80910, entitled "The State of Ohio ex rel. Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, vs. Swift and Company and The Northern Refrigerating Company," is based on the violation by appellees of the provisions of two penal statutes of the State of Ohio, to-wit, Section 6393, et seq. of the General Code of Ohio, known as the Valentine Anti-Trust Law, and in part as follows:

"Sec. 6400. The several courts of Common Pleas in the state are hereby invested with jurisdiction to restrain and enjoin violations of this chapter. For a violation of any provision of this chapter by a corporation or association mentioned herein, the attorney general, *or the prosecuting attorney of the proper county, shall institute proper proceedings in quo warranto, injunction or otherwise in a court of competent*

jurisdiction in any county in the state where such corporation or association exists, does business or has a domicile. When such suit is instituted by the attorney general in quo warranto, he may begin the same in the Supreme Court of the state, or the Circuit Court of Franklin County. When such suit is instituted by the attorney general to restrain and enjoin a violation of any provision of this chapter he may begin the same in the Court of Common Pleas of Franklin County. Such proceeding to restrain and enjoin such violation or violations shall be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. Upon the filing of such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. In any action or proceeding in quo warranto by the attorney general or a prosecuting attorney against a corporation the court in which such action or proceeding is pending may, ancillary to such action or proceeding restrain or enjoin the corporation and its officers and agents from continuing or committing during the pendency of the action the alleged act or acts by reason of which the action is brought. When, in a proceeding in quo warranto by the attorney general or any prosecuting attorney, any corporation incorporated under the laws of this state is, on final hearing found guilty of violating any of the provisions of this act, the court may declare a forfeiture of all its rights, privileges and franchises to the state and may order the incorporation dissolved and appoint a trustee or trustees to wind up its affairs as is provided in other cases in quo warranto."

And *Section 1151-1 et seq. of the General Code of Ohio*, known as the Smith Cold Storage law, and in part as follows:

"Sec. 1155-13. * *

Section 13. No person, firm or corporation shall sell, or offer, or expose for sale, any of the following foods which have been held for a longer period of time than herein specified in a cold storage warehouse: * *; whole carcasses of pork, or any parts thereof, six months; * * *."

"Sec. 1155-19. * *

Section 19. Whoever violates any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall for the first offense be fined not more than five hundred dollars, and for the second and each subsequent offense not more than one thousand dollars, and in addition thereto imprisoned in the jail of the proper county not less than thirty nor more than ninety days, or both."

This action is not "a removable cause" within the contemplation of the Federal Statutes providing for the removal of causes from a state to a Federal court, for the following reasons:

FIRST: The Federal District Court has no jurisdiction on removal of a cause of action based entirely on a State statute, for the Federal District Court has no original jurisdiction of such an action.

In the case of *Commonwealth of Kentucky vs. Chi-*

cago I. & L. Railway Company, 123 Fed. Rep., page 457, which was an action by the State of Kentucky to enforce the collection of state tax levied under a state statute against the defendant railway company, an order of removal was denied. The syllabus is as follows:

“Removal of causes—Federal Questions—
Action based on State Statutes.

An action by a state to enforce collection of a tax imposed by a state statute is not one of which a Circuit Court of the United States would have original jurisdiction under section 1 of the judiciary acts of 1887 and 1888 (Acts March 3, 1887), c. 373, 24 Stat. 552 and Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508) either as being between citizens of different states or as arising under the constitution or laws of the United States, and is therefore not removable by defendant under section 2 (24 Stat. 552, 25 Stat. 433) (U. S. Comp. St. 1901, p. 509) although the petition may be demurrable for a reason found in the federal constitution.”

The court on page 458 of the Opinion say in part as follows:

“The claim that this court has jurisdiction of the action is based solely upon the provision of section 2 of the jurisdictional acts of 1887 (24 Stat. 553) and 1888 (25 Stat. 434, c. 866) U. S. Comp. St. 1901, p. 509, which authorizes the removal of any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, of which

the Circuit Courts of the United States are given original jurisdiction by section 1. It is contended by defendant that this action is a suit arising under the constitution and laws of the United States, of which the Circuit Courts thereof are given original jurisdiction by the said Section 1. Undoubtedly it may be said that the plaintiff's petition presents a federal question, to-wit, whether said statutory provision is a violation of the commerce clause of the federal constitution, which can be and is raised by demurrer to the petition; but it does not follow from this that it can also be said that suit by reason of that fact is one 'arising under the constitution and laws of the United States,' within the meaning of those words in the acts of 1887 and 1888. So far as it can be said to arise at all, it arises under the act of the Legislature of Kentucky, and is based solely on it. The state of Kentucky is seeking to enforce no right or benefit conferred upon it or to which it is entitled by virtue of the constitution or laws of the United States. It certainly could not have brought this action in this court in the first instance, and claimed that it had jurisdiction thereof under section 1 of said acts, because the defendant could claim in defense of the action that the statutory provision in question was in violation of the federal constitution, and hence the action could not be maintained at all. If this court could not have had original jurisdiction of the action, it cannot obtain jurisdiction thereof upon removal. The following cases support our position: *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Kansas v. Atchison, T. & S. F. Ry. Co.* (CC) 77 Fed. 339; *Shields v.*

Bordman (CC) 98 Fed. 455; *Arkansas vs. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144."

In the case of *The State of Arkansas vs. Kansas and Texas Coal Company and San Francisco Railroad*, found in 183 U. S. 185, which was a bill filed in the County Court of Arkansas by the state of Arkansas on the relation of Joe Johnson, prosecuting attorney, seeking to restrain the Kansas and Texas Coal Company from importing a number of armed men in a community where a strike was in progress, the Supreme Court in holding that the action was one brought by the State of Arkansas to enforce the police powers inherent in the state government, and therefore not a removable action, say in the first paragraph of the syllabus as follows:

"The test of the right to remove a case from a state court into the Circuit Court of the United States under section two of the act of March 3, 1887, as corrected by the act of August 13, 1888, is that it must be a case over which the Circuit Court might have exercised original jurisdiction under section one of that act."

We contend that the District Court could not have entertained original jurisdiction of this cause, the State of Ohio being the real party plaintiff, as the only Federal court having original jurisdiction of such

a cause would be the Supreme Court of the United States, under the Federal constitution.

(See Constitution of United States, Art. III, Sec. 2, Par 2.)

In the case of *Re Winn*, 213 U. S. 458, the first paragraph of the syllabus is as follows:

"No cause can be removed from the state court to the Circuit Court of the United States unless it could have originally been brought in the latter court. *Boston Mining Co. v. Montana Ore Co.*, 188 U. S. 632, and *Ex parte Wisner*, 203 U. S. 449."

NOT A "CIVIL ACTION" WITHIN THE MEANING OF REMOVAL ACT

Second. The action filed by the State of Ohio against Swift and Company and The Northern Refrigerating Company is not "a civil action at law or in equity" within the meaning of the statutes of removal, for the reason that it is an action based on, the violation of two penal statutes of the State of Ohio, wherein the State of Ohio is seeking to enforce the provisions of said criminal statutes by writ of injunction and the appointment of a receiver to dispose of the property held in storage in violation of the Anti-Trust Law and the Smith Cold Storage Law; and the mere fact that the remedy of injunction is resorted to by the State of Ohio to enforce the provisions of its penal statutes and prevent a continued violation of their provisions, does not change the nature or character of the action.

In the case of the *City of Montgomery, Ala., v.*

Postal Telegraph-Cable Co., found in 218 Federal Reporter, page 471, which was an action by the City of Montgomery against The Postal Telegraph Company, wherein the City of Montgomery alleged in its bill that the Telegraph Company was doing an interstate business in the City of Montgomery; that it had not paid and refused to pay a license tax as required by an ordinance of the City of Montgomery making it an offense or misdemeanor to carry on such telegraph business without having paid the required tax; the bill prayed for an injunction restraining the defendant company from doing business in violation of the ordinance and for a decree against the Teelgraph Company for the amount of the license tax together with the penalty. This action was sought to be removed to the District Court, and on motion made to remand the case to the State Court, Judge Clayton, in granting the motion and remanding the case to the State Court, says in part as follows:

"(3) If this is not a 'suit of a civil nature,' it is not removable, and therefore cannot be subjected to the jurisdiction of the federal court; and, in determining the nature of the suit, the court must look to the subject-matter of the litigation, and not to its form. In *Maloney v. American Tobacco Co.* (CC) 72 Fed. 801, it was said:

'A question here is whether or not the present proceeding is a suit of a civil nature. *This court does not adjudicate upon*

penal or criminal statutes of a state. The purpose of this information is to enforce against the American Tobacco Company the prohibition from doing business in Illinois, and the cause of action alleged is conduct which, within the meaning of the statute, if it have any meaning, is an offense or misdemeanor. The information does not show, as the ground of the action, any contract right in the state or any property right or easement vested in the state, as trustee, representing the public or otherwise. The action is based on a statute or rule of conduct which the state, as a government agent, has prescribed, and the violation of which on the theory of the information is an offense or misdemeanor. This is not, in its nature, a suit to recover for, or stop the continuance of an injury. It is the prosecution of an offender against a criminal statute. * * So, here, the circumstance that an injunction is the instrument, and apparently the only instrument, of the state's displeasure, does not change the essential nature of the conduct complained of, or of the legal sanction to which said conduct must be referred.'

In *Arkansas v. St. Louis & S. F. Ry. Co.* (CC) 173 Fed. 572, the state law provided that any operator of a railroad who committed any violation of the law, for which no other penalty was prescribed, should be fined not less than \$500 nor more than \$3,000, and that the penalty was recoverable in the name of the state. It was also provided that, where there was a failure on the part of the shipper to give routing instructions, it was the duty of the railroad receiving the shipment to forward it by

such route as would make the lowest freight rate. The railroad company received a shipment of lime at one point in the state, consigned to another point in the state. No instruction as to routing was given. The railroad made the shipment over its own road to a point in Oklahoma, and then by another railroad to the point of consignment in Arkansas. Suit was filed in the name of the state against the initial railroad, alleging that the route over which the shipment was made charged a freight rate of 23 cents per hundredweight, and that the shipment should have been made over the line of the initial carrier and a shorter connecting line to the point of consignment; the original and connecting lines being wholly in Arkansas. It was alleged that this latter route was a reasonable one, and that the cost of the shipment over it would have been only 12 cents per hundredweight. The penalty was claimed, etc. On the application of the railroad the case was removed to the Federal Court. The state moved to remand on the ground that the case was not a 'suit of a civil nature' but was for the recovery of a penalty. The court, in granting the motion, said:

'The question presented and urged at the hearing was that the suit is not of a civil nature. The question therefore is: What is the nature of the action provided by Section 6813, Kirby's Dig. Ark. After a most careful and patient investigation of a wide range of authorities, I have reached the conclusion that the action, while civil in form, is in its nature criminal. The case, therefore, must be remanded to the state court, solely upon the principle decided in the case of

Iowa v. Chicago, B. & Q. R. Co. (CC) 37 Fed. 497, 3 L. P. A. 554, and which case seems to have been acquiesced in and is in harmony with various cases, among others, Maloney v. American Tob. Co. (CC) 72 Fed. 807; State of Indiana v. Allegheny Oil Co. (CC) 85 Fed. 870; Ferguson v. Poss (CC) 38 Fed. 161, 3 L. R. A. 322; State v. Day Land & C. Co. (CC) 41 Fed. 228.'

'Suit of a civil nature' means a suit for the remedy of a private wrong. Words and Phrases, Vol. 7, p. 6779; Koch v. Vanderhof, 49 N. J. Law, 619, 9 Atl. 771.

In Ferguson v. Ross (CC), 38 Fed. 161, L. R. A. 322, the defendant sued in his official capacity to recover certain penalties, and the court held that the proceeding was of a 'penal and not civil nature,' within the meaning of the removal act.

In the case of State of Texas vs. Day Land & C. Co. (CC), 41 Fed. 228, 230, it was said:

'The test whether a suit at law or in equity is a suit of a civil nature, or of a criminal nature, is the nature of the right asserted and at issue. Ames vs. Kansas, 111 U. S. 460, 4 Sup. Ct. 437 (28 L. Ed. 482). See also Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524 (29 L. Ed. 746); Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437 (29 L. Ed. 684). It is not the form, but the nature, of the action that determines the question of removal.' And in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed., 1123, the court said:

'The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to

the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts of species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community." "

A Federal court will not treat as removable, and therefore will not take jurisdiction of a suit brought in state court to enforce a criminal or quasi criminal state statute, or of a suit brought to recover a penalty under such state statute.

In *Iowa v. Chicago, B. & Q. R. Co.* (CC) 37 Fed. 497, 503, 3 L. R. A. 554, the court said:

* * * An action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the Removal Act, it is not a removal case.'

And again in *Iowa v. Chicago B. & Q. Ry. Co.*, supra, the court said:

'And now it becomes necessary to notice the last utterance of the Supreme Court, in the case of *Wisconsin v. Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370 (32 L. Ed. 239). That case was this: The State of Wisconsin brought an action in one of her own courts against the defendant to recover a penalty prescribed by the statutes for a transaction of insurance business in the state without a license. The action was a civil action in form, to-wit: an action of debt. The statutes pro-

vided that one-half of the penalty should go to the state, and one-half to the insurance department, to cover expenses, etc. Judgment was recovered in that action for the amount of the penalty. The defendant was a citizen of the state of Louisiana. Thereupon the state of Wisconsin brought an original action in the Supreme Court of the United States against the defendant, a citizen of another state, on that judgment. It will be seen that that action is somewhat removed from this, in that, not being an original action to recover a penalty, it was to recover on a judgment in a civil action for a penalty. By the constitution of the United States the Supreme Court has original jurisdiction of controversies between a state and a citizen of another state. Yet, notwithstanding this general jurisdiction of the Supreme Court it held that it had no jurisdiction of this action. Several lines of argument were followed by the court in reaching its conclusion. It held that that grant of jurisdiction was of judicial power, and was not intended to confer upon the courts of the United States jurisdiction of a suit on prosecution by the one state of such a nature that it could not, on the settled principle of public and international law, be entertained by the judiciary of another state at all; that the enforcement of the criminal laws of a state was by such principles limited exclusively to the courts of the state whose laws were charged to have been violated; and that the form of the action prescribed was immaterial—courts looking ever to the substance, nature and purpose of the action; and that is the case at bar, although the form of action was civil, being an action of debt *

* * for a penalty, it was in substance of a criminal nature, and an effort upon the part of the state to enforce its criminal laws.'

In *Barron v. City of Anniston*, 157 Ala. 399, 402, 48 South, 58, 59, it was held that a proceeding for the recovery of fines and penalties, *imposed by a city ordinance* are quasi criminal and are governed by the same rules of procedure and evidence which control in criminal cases. And there the court said:

* * * Proceedings for the recovery of fines and penalties are quasi criminal, and should be conducted with greater regard to strictness than attaches to pleadings in civil cases.' " * * * Again, this court has said that proceedings for the violation of city ordinances are in no sense "civil causes," but are "punitive regulations," and the object of a proceeding for the violation of them is not the redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence they are termed "quasi criminal proceedings."

In the present case the city ordinance is to be treated as a state statute, and the rule stated in *Iowa v. Chicago, B. & Q. R. Co.*, supra, is to govern in the consideration of the motion to remand. In *Davis & F. Mnfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Cup. Ct. 489, 47 L. Ed. 778, municipal ordinances were assailed on the ground that they were unconstitutional and the court held that:

The state having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the state through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a state

law within the meaning of Section 5 of the Circuit Court of Appeals Act (Act March 3rd, 1891, c. 517, 26 Stat. 827) Comp. St., 1913, 1215. *City Railway v. Citizens' R. R. Co.*, 166 U. S. 557 (17 Sup. Ct. 653, 41 L. Ed. 1114); *Penn Mutual Life Ins. Co., v. Austin*, 168 U. S. 685, 694 (18 Sup. Ct., 223, 42 L. Ed. 626); *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148 (21 Sup. Ct. 575, 45 L. Ed. 788)."

Therefore the city ordinance must be treated as the criminal statute of the state. The doing of intra-state business by the defendant company, without having first taken out the license required by the ordinance is an offense or mis-demeanor, and the continued violation of the ordinance, according to the theory of the bill is a public nuisance, which is sought to be abated by permanent injunction. The bill is a means adopted by the city for the enforcement of its penal ordinance. The state court is a court of competent jurisdiction, and doubtless will properly adjudicate this controversy. However that may be, a removable cause is not presented to this court.

It was suggested, during the argument, that the bill filed in the city court is without equity, because there is an adequate remedy at law—an action for the amount of the license tax—and, again, that the prayer of the bill to restrain the Telegraph Company from further carrying on its intrastate business is inconsistent with the prayer for the recovery of the amount of the license tax, the payment of which, it is insisted, would authorize the doing of intrastate business by the Telegraph Company. But these suggestions go to the equity of the bill, and, if sound, can be made avail-

able as defense in the city court. On motion to remand, the federal court will not inquire into the sufficiency of the plaintiff's pleadings. *Smith v. Camas Prairie Ry. Co.* (D. C.) 216 Fed. 799.

From what has been said, it follows that this suit must be remanded to the city court of Montgomery, and, inasmuch as the original case has been remanded, the application for the injunction, prayed for in the ancillary bill, must be denied.

Order and decree will be entered accordingly."

NO "DIVERSITY OF CITIZENSHIP"

Third: (a) There is no "diversity of citizenship" within the meaning of the removal statutes, inasmuch as the original action in the Court of Common Pleas was brought by the "State of Ohio" as plaintiff and a state is not a "citizen" within the meaning of the removal act.

In the case of Upshur County v. Rich, 135 U. S. 467, which was an action to recover an assessment on a tract of land situated in Upshur County, in the state of West Virginia, owned by the defendants who were non-residents, which action was sought to be removed to the District Court by the defendants, and the objection to the removal was based on two grounds: first, that the case was not a suit within the meaning of the removal act; and second, that if it were such a suit within the meaning of the removal act, that the state

of West Virginia was a necessary party to the suit, and that therefore there was no diversity of citizenship because of the fact that a state could not be construed as "a citizen" within the meaning of the removal act; Mr. Justice Bradley, in the course of the opinion on page 470, says in respect to diversity of citizenship, as follows:

"It must be 'a suit' between citizens of different states. Is this such a suit? We do not see how it can be called such. The original petition made the State of West Virginia and the county of Upshur parties defendant; and the petition of removal alleged that the state and county were necessary parties to the controversy. If, therefore, the proceeding could be called a suit at all, it was a suit against the state as well as the county, and such a suit is not within the category of removal cases. A state is not a citizen, if a county is."

In the case of *Postal Telegraph Cable Co. v. Alabama*, 155 U. S., page 482, which was an action brought in the Circuit Court of Montgomery County, Alabama, by the State of Alabama against the Postal Telegraph Cable Company organized under the laws of New York, to recover taxes and penalties claimed due the State of Alabama under a state statute, the first paragraph of the syllabus is as follows:

"Under the Judiciary Acts of the United States, a suit taken between a state and a citizen or corporation of another state is not a suit between citizens of different states; and the Cir-

cuit Court of the United States has no jurisdiction of it, unless it arises under the constitution, laws or treaties of the United States."

Mr. Justice Gray, in supporting the syllabus, in the course of his opinion, on page 487, says as follows:

"A state is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the constitution, laws or treaties of the United States. *Ames v. Kansas*, 111 U. S., 449; *Stone v. South Carolina*, 117 U. S., 430; *Germania Ins. Co. v. Wisconsin*, 119 U. S., 473."

In the case of *Arkansas v. Kansas and Texas Coal Co.*, supra, Chief Justice Fuller, on page 188 of the opinion, says with respect to diversity of citizenship where a state is a party, as follows:

"We need not spend any time on the contention that this was a controversy between citizens of different states. The Circuit Court correctly held otherwise. The state of Arkansas was the party complainant, and a state is not a citizen. *Postal Telegraph Cable Co., v. Alabama*, 155 U. S., 482."

THE STATE THE REAL PARTY PLAINTIFF

(b) The fact that the action was styled, "The State of Ohio on the relation of Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio," did not change the nature of the action, and the further fact that the petition for removal ignored the State of Ohio as plaintiff and alleged that Allen J. Seney as such Prosecuting Attorney was a citizen of the State of Ohio, and that Swift and Company was a citizen of the State of Illinois, and therefore that the controversy was between citizens of different states,—does not change the fact that the action was brought by "The State of Ohio," who was the real party in interest, seeking to enforce on behalf of its people the police powers of the state by prohibiting and preventing an infraction of the criminal laws of the State of Ohio. If the State of Ohio was not the real party in interest and the plaintiff then this action fails for want of parties.

This action if it can be maintained at all is by authority of Section 6400 hereinbefore quoted and *Section 2916 of the General Code of Ohio*, which is as follows:

"Sec. 2916. The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute *on behalf of the state* all complaints, suits, and con-

troversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the Probate Court, Common Pleas Court and Court of Appeals. In conjunction with the attorney general, he shall also prosecute cases in the Supreme Court arising in his county. * * *."

In the case of *Arkansas v. Kansas and Texas Coal Company, supra*, which, as we have already called attention, was an action in equity, brought by the *State of Arkansas on the relation of Joe Johnson, Prosecuting Attorney for the 12th Judicial District, against The Kansas & Texas Coal Company and the St. Louis and San Francisco Ry. Co.*, seeking to restrain the defendants from importing a large number of armed men into a community where there was a high state of excitement owing to a strike by some miners; a preliminary injunction was granted the State of Arkansas against said defendants; defendants filed their petition and bond for removal and made application therefor, which was denied by the court of Sebastian County, whereupon the defendants filed in the United States Circuit Court for the Western District of Arkansas a certified transcript of the record and pleadings and papers in the case. The petition for removal averred (as does the petition for removal in this case) that Joe Johnson, the prosecuting attorney, was a citizen of Arkansas, that the defendants were citizens of

Missouri, and that the controversy in the suit was wholly between citizens of different states, and one arising under the Constitution and laws of the United States, because defendants were engaged in interstate commerce, and the action was an unlawful interference therewith, by reason of the commerce clause of the Federal Constitution and the laws passed pursuant thereto. A motion to remand the case was overruled and the bill was dismissed and appeal prosecuted to the Supreme Court of the United States. Chief Justice Fuller, in delivering the opinion of the court, says as follows:

"The gravamen of the bill was the injury to the health, morals, peace and good order of the people of the town and county, the infliction of which was alleged to be threatened by the bringing within their precincts of certain persons by defendants. No statute of the state was referred to as applicable, *but the enforcement of the police power was sought through the interposition of a court of equity by way of prevention of an impending public nuisance.* The Circuit Court was of opinion that the bill could not be maintained, but, without intimating any conclusion to the contrary, or criticising its formal sufficiency, the question that meets us on the threshold is whether the case ought to have been remanded to the state court.

We need not spend any time on the contention that this was a controversy between citizens of different states. The Circuit Court correctly held otherwise. *The State of Arkansas was the party complainant, and a state is*

not a citizen. Postal Telegraph-Cable Co. v. Alabama, 155 U. S., 482.

We inquire, then, if the cause was removable because arising under the constitution or laws of the United States.

The general policy of the act of March 3, 1887, as corrected by the act of August 13, 1888, (24 Stat. 552, c. 373; 25 Stat. 433, c. 866), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the Circuit Courts. Those cases, and those only, were made removable under Section two, in respect of which original jurisdiction was given to the Circuit Courts by Section one. Hence it has been settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. *And moreover that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the constitution or a law or treaty of the United States or under statutes of the United States or of a state, in conflict with the constitution. Tennessee v. Union and Planters' Bank*, 152 U. S., 454; *Chappell v. Waterworth*, 155 U. S., 102; *Walter v. Collins*, 167 U. S., 57; *Sawyer v. Kockersperger*, 170 U. S., 303; *Florida Central & Peninsula Railroad v. Bell*, 176 U. S. 321.

In this case the state asserted no right under the constitution or laws of the United States,

and put forward no ground of relief derived from either. There were no averments on which the state could have invoked *the original jurisdiction* of the Circuit Court under section one of the act, and that is the test of the right of removal under section two.

The police power was appealed to, the power to protect life, liberty and property, to conserve the public health and good order, which always belonged to the states, and was not surrendered to the general government, or directly restrained by the constitution. The fourteenth amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest Congress with power to legislate upon subjects which are within the domain of state legislation. *In re Rahrer*, 140 U. S., 545, 554. It is true that when the police power and the commercial power come into collision, that which is not supreme must give way to that which is supreme. But how is such collision made to appear?

Defendants argue that the Circuit Court might have properly taken judicial notice, or did so, of the fact that the persons whose advent was objected to as perilous to the community could only be brought to Huntington by way of the Indian Territory, and also that the word 'import' as used in the bill meant to bring into from another state or foreign country; that, therefore, 'the question is fairly presented by the complaint whether the State of Arkansas

has the authority to prevent the coal company and the railroad company from bringing into the state over the line of this railroad, laborers from other states or foreign countries;' and hence that the Circuit Court had jurisdiction. We do not agree with either premise or conclusion.

The word 'import' necessarily meant bringing into the county and town from outside their boundaries, but we do not think, taking the whole bill together, that as here used its necessarily signification was the bringing in from outside of the state.

And as to judicial knowledge, the principle applies 'that the right of a court to act upon what is in point of fact known to it must be sub-ordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.' Thayer Ev. Ch. VII, 281.

In *Mountain View Mining & Milling Co., v. McFadden*, 180 U. S., 533, which was a petition for removal, the suit was one brought in support of an adverse claim under the Revised Statutes, Sections 2325, 2326, and it had been previously decided that such a suit was not one arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal courts regardless of the citizenship of the parties. And we said: 'It is conceded by counsel on both sides that those decisions, are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact that the Mountain View lode claim was located upon what had been or was an Indian reservation,' and 'of the act of Con-

gress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain; notwithstanding no claim based on these facts was stated in the complaint. But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge.' *Oregon Short Line, etc. Railway v. Skottowe*, 162 U. S. 490; *Chappell v. Waterworth*, 155 U. S. 102; *Commonwealth v. Wheeler*, 162 Mass., 429; *Partridge v. Strange*, Plowden, 77.

But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress or with the Fourteenth Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States.

When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them. If errors supervene, the remedy by writ of error is open to the party aggrieved. Robb v. Connolly, 111 U. S., 624, 637."

On the question of The State of Ohio being the real party in interest, we call the Court's attention to the allegations of the petition in the State Court charging a violation of the Valentine Anti-Trust Law and the Smith Cold Storage Law, the prayer for injunction

against removing the pork, the prayer for injunction restraining further violations of these laws, and ask, Was Allen J. Seney, Prosecuting Attorney, reaping any benefit for himself or was The State of Ohio seeking to enforce the police powers of the State, as was held by the Supreme Court of the United States in the case of *Arkansas v. Kansas & Texas Coal Co.*, *supra*? An examination of the cases cited by Judge Killits on this question in his opinion will disclose that the State, who it was claimed was the real party in interest, was not even a nominal party to the action and that the relief sought in none of these cases was the enforcement of the police powers or criminal laws of the state; whereas in the case of *Arkansas v. Kansas & Texas Coal Co.*, as in the case at bar, the State on relation of the Prosecuting Attorney was seeking to enforce in a court of equity the police powers of the State, and this Court held that the State was the real party in interest.

The Supreme Court of Ohio in the case of *Ohio ex rel Schlessinger Prosecuting Attorney vs. Columbus Packing Company*, advised of the fact that the pork involved in that case was held in storage more than six months longer than allowed by the Smith Cold Storage Law of Ohio, held that fact alone to be *convincing proof* in and of itself of the violation of the Valentine Act in the following language used by

Judge Nichols, in the course of the Opinion, 100 O. S. 285, at page 286:

By the terms of the Cold Storage Act it is made unlawful to sell or offer for sale certain food products therein named held in storage for a period of longer than six months. By the terms of the Valentine Anti-Trust Act it is made unlawful to create or carry out restrictions in trade or commerce. It is further made unlawful to prevent competition in the sale or purchase of a commodity * * * *. It is claimed that the storage of a food commodity for so long a period as to render it unsalable in Ohio by the owner is per se an act in restraint of trade, and that such storage acts as a preventative of competition.

"The vital and controlling issues of fact in the case centers around the duration of time the pork in question had remained in cold storage prior to the institution of the suit.

"The defendant storage company expressly admits that the goods had been stored in its warehouse for the period of time set forth in the petition. * * * *. Further along in the answer the packing company did, however, admit in substance the allegations in respect to the alleged unlawful storage. * * * *

"The fact of storage in excess of six months having been established, the question remains, does the admitted conduct of the parties defendant constitute a violation of the Cold Storage Act and the Anti-Trust Act, either or both. * * * *

"While there is no express provision in the act making it unlawful to store food for a period longer than six months there is an unmistakable declaration of public policy that in

Ohio pork products ought not be stored for a period greater than six months, and it, therefore, becomes the manifest duty of the courts to prevent such practices if in their power so to do. * * * *

"The acts of the parties defendant in respect to the food in question constitute conduct in restriction of trade and have a patent tendency to increase the price of the commodity. It also removes competition in the sale and purchase of merchandise.

"The certain effect of the conduct of the parties in the case at bar was to create an artificial shortage in pork products. To retain food in storage, and to withhold it from the channels of trade for so long a time that the food, so far as the markets of Ohio are concerned, was, if left in the hands of the owner as effectually destroyed, as if it had been annihilated in a conflagration, is unexplainable, except on the theory of a form of conspiracy to cause similar food products to realize a higher scale of value. * * *

"No legitimate purpose can be ascribed to the owners of the property in knowingly contributing to the destruction of the commercial value of their own product. The necessary conclusion is that the object of the parties was to maintain as to similar products a very satisfactory if not over-profitable market or what is more probable to cause a still further increase in the selling value thereof.

"The case was presented to the court that the defendant companies had dealt with the pork in a manner prohibited by law. Their admitted conduct was such as to justify a court of equity in finding that their purpose was to hold

it beyond the period allowed by law and for the purposes which the law prohibits.

"The state statute fixes the maximum storage period at six months. But it must be noted that the question under consideration is, whether the conduct of the parties in this case is such as to demonstrate that the purpose of the parties in withholding the commodity from the market was to accomplish the purposes or any of them which are prohibited by the Anti-Trust law of Ohio. As has been heretofore said in the course of this opinion the cold storage act merely prescribes a certain course of conduct to be complied with, and the violation of its provisions furnishes the convincing evidence of the illegal purpose to which reference has been made."

Columbus Packing Co. v. Ohio ex rel Slessinger Pros. Atty., 100 O. S., 285.

This Court on October 20, 1919, refused to review the case last cited.

The Smith law only prohibits the sale by those who have stored the meat in violation of this law, and as the Supreme Court of Ohio well said: it neither prevents nor prohibits the Court or a Receiver in an action by the State under the direction of the Court from selling for food the property seized. The statute does not declare the meat unfit for food. It is a statute directed against *hoarding foods*, under the *police powers of the State*, and in an action wherein these police powers are sought to be invoked to prevent such hoarding, certainly it cannot be claimed, as the Supreme

Court of Ohio well said, that the court, or a receiver under the direction of the Court in an action by the State could not sell the food for the benefit of the public.

(c) Under the removal statute other actions which can be removed to a Federal Court are those arising and founded on the Constitution, laws or treaties of the United States. In determining the question of whether or not the action arises under the Constitution, laws or treaties of the United States, reference must be had solely and alone to the petition filed by the plaintiff in the action sought to be removed. We submit a reference to the petition filed by the State of Ohio in the Court of Common Pleas against Swift and Company and The Northern Refrigerating Company, discloses that the action arises and is based solely upon the violation of the statutes of the State of Ohio, and it does not in any way, shape or form arise or depend upon any law, treaty or the Constitution of the United States.

In the case of *Postal Telegraph Cable Co. v. Alabama, supra*, the Court on page 487, say in part as follows:

"It is equally well settled that under the provisions above referred to, of the existing act of Congress, no suit can be removed by a defendant from a state court into the Circuit

Court of the United States, as one arising under the Constitution, laws or treaties of the United States, *unless the fact that it so arises appears by the plaintiff's statement of his own claim; and that a deficiency in his statement, in this respect, can not be supplied by allegations in the petition for removal, or in subsequent pleadings in the case. Tennessee v. Bank of Commerce, 152 U. S. 454; Chappell v. Waterworth, ante. 102.*"

In the case of *Re Winn*, *supra*, the second and third paragraphs of the syllabus, are as follows:

"A suit only arises under the Constitution and laws of the United States within the meaning of par. 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, conferring jurisdiction on the Circuit Court when the plaintiff's statement of his own cause of action shows that it is based on those laws or that Constitution, and it is not enough that defendant may base his defense thereon. *Louisville & Nashville Railroad v. Mottley, 211 U. S. 149.*"

"Although a defendant in the state court may set up a defense based on Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by this court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States."

See also

State of Arkansas v. Kansas and Texas Coal Co. and San Francisco Railroad, 182 U. S. 185.

NO DENIAL OF EQUAL PROTECTION OF LAW

Fourth. On the face of the record, including the petition for removal, it does not appear as a fact that Swift & Company have been or will be denied the "equal protection of the laws of the United States." All that appears in the record is the averment of the petition for removal,—that said statutes have been construed and held "by certain courts of the State of Ohio" to relate to and cover property whether in or the subject matter of interstate commerce; and that "certain courts" of Ohio have construed said statutes and other laws of Ohio so as to authorize and permit the seizure of property without due process of law.

We submit the statutes providing for removal on the ground that a defendant is being denied "the equal protection of the law" has reference to a constitutional or legislative denial of equal rights, or an inability to enforce them resulting therefrom, and not to any denial or inability to enforce resulting from the action of the judiciary.

The provisions of the removal statutes are not as broad as the guarantees of the Fourteenth Amendment of the United States Constitution, and, where equal rights are denied a defendant by the judiciary, and that can only be asserted when the rights are actually denied, and can only be determined on and during the trial of the cause, must be remedied by error proceed-

ings to the United States Courts and not by removal in anticipation that because "certain courts" have denied such rights in another case defendant "will be denied" its rights upon the trial of its case.

In the case of *Virginia v. Rives*, 100 U. S., page 313, the fourth paragraph of the syllabus is as follows:

"But the Fourteenth Amendment is broader than Section 641, as the latter does not apply to all cases in which the equal protection of the laws may be denied to a defendant. The removal thereby authorized is before trial or final hearing. But the violation of the constitutional prohibitions, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know until then that the equal protection of the laws will not be extended to him. *Certainly not until then can he affirm that it is denied.* To such a case—that is, to judicial infractions of the constitutional amendment after the trial has commenced—Section 641 has no applicability. It was not intended to reach such cases. *They were left to the revisory power of this court.*"

The syllabus is borne out on pages 318 and 319 of the Opinion, where a careful analysis of the rights of removal in this class of cases is made.

In the case of *Scott v. Kinney*, 137 Fed. Rep., page 1009, where the petitioner asks for removal of the case because of her inability to secure an attorney, or

because the plaintiff had been able to secure postponement of the trial against defendant's protests, the prayer for removal was denied. A discussion of the right to remove cases under this heading is found in the opinion on page 1011, as follows:

"There is no allegation that there is any law of the State of Pennsylvania, or rule of court of the city of Philadelphia, which discriminates against the defendants. If the defendants have been unable to bring their case to trial in the state court, it is because of their failure to secure an attorney for that purpose, or on account of the action or non-action of the courts, and not from any command or authority of the state, or any provision of the laws of the state. For such wrongs, in the language of the Supreme Court, section 641 has no application. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review by the supreme judicial tribunal of the land. *Virginia v. Rives*, 100 U. S. 319, 25 L. Ed. 667.

The denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers and on account of which a civil suit or state court, is primarily, if not exclusively, a criminal prosecution may be removed from a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at or during the trial of the case. *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075.

It is only when some state law, ordinance, regulation, or custom hostile to these rights is alleged to exist that a removal can be had under the first clause of this section. In *re Wells*, Fed. Cas. No. 17,386. It was intended to protect against state action, and against that alone. *In other words, the statute has reference to a constitutional or legislative denial of equal rights, or an inability to enforce them resulting therefrom, and not to any denial or inability to enforce resulting from the action of the judiciary.* *Virginia v. Rives*, 100 U. S. 339, 25 L. Ed. 676. And it refers to legal disabilities and legal impediments, and not to private infringements by prejudice or otherwise, when the laws themselves are impartial and sufficient. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *LeGrand v. U. S.* (CC) 12 Fed. 577, note 583.

Thus it will be seen that the Supreme Court has held that removals under section 641 can only be had when the party complaining cannot enforce rights secured to him by the law providing for equal civil rights of the citizens of the United States in a judicial tribunal of the state by reason of some enactment or constitutional provision of the state, and the allegations in this petition fail to show or even suggest such a case."

In the case of *Commonwealth of Kentucky v. Powers*, 201 U. S., page 1, the Supreme Court of the United States reviews all of the prior cases of removal under Section 641 of the Revised Statutes of the United States, and affirms the cases above cited.

In this case the defendant contended that the

Court of Appeals of Kentucky had refused to recognize a pardon granted him as having any legal effect, and they had thereby denied him the equal civil rights and protection of the laws secured him by the provisions of the Constitution and laws of the United States, and that he was denied and could not enforce in any judicial tribunal of Kentucky the rights which the pardon gave him.

The Supreme Court, on page 40 of the opinion, say as follows:

"Manifestly, in view of what has already been said this question as to the pardon of the accused, does not make a case of removal on the ground of the denial or inability to enforce in the judicial tribunals of Kentucky of a right secured to the accused 'by any law providing for the equal civil rights of citizens of the United States' or of all persons within the jurisdiction of the United States. Whether the non-recognition by the courts of the state of the validity of the alleged pardon involved a denial of any right secured to the accused by any other law or by the Constitution of the United States, we need not now consider. As the Circuit Court could not, in virtue of Section 641, take cognizance of this prosecution on removal, we cannot properly pass upon the merits of any question of Federal right which might arise in the case. It is sufficient to say that if the accused, by reason of the Taylor pardon, acquired any right under the Constitution or laws of the United States, and if at the next trial of his case that right, having been specially set up and claimed, should be denied

by the highest court of the State in which a decision of that question could be had, such action of that Court, in respect of that pardon, can be reviewed here upon writ of error. We do not perceive that any question arising out of the pardon could make a case under Section 641 for the removal of the prosecution from the state court."

We in this same connection call your Honors' attention to the fact that this same claim was asserted in another action of the same nature. We refer to the case of *State of Ohio vs. Columbus Packing Company* in which case this Court on October 20th, 1919, denied the right to file a petition in error.

DEFENSE CLAIMED THAT PROPERTY IS SUBJECT OF INTERSTATE COMMERCE. DOES NOT CONFER JURISDICTION ON FEDERAL COURT.

Fifth. We have disposed of all the questions upon which the appellees sought to remove said cause to the Federal District Court, with the exception of the alleged interference with property, the subject of interstate commerce.

We submit the question of the interstate character of this property has no bearing on the removability of this cause, nor does the fact that the property involved in litigation in the State Court may have an interstate character, affect the jurisdiction of the state court

to hear and determine the rights of the parties with respect thereto, so long as the *relief sought* is not based on the interstate character of the property or any federal statute relating to or governing property, the subject to interstate commerce.

In the case of *Arkansas v. Kansas & Texas Coal Co.*, supra, the Court says on page 190 of the opinion as follows:

"But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, as contended, it would only demonstrate that the bill could not be maintained at all and not that the cause of action arose under the Constitution or laws of the United States."

In the case of *Re Winn*, supra, the third paragraph of the syllabus is as follows:

"Although a defendant in the state court may set up a defense based on Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by this court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States."

and on page 465 the Court say, in part, as follows:

"Tested by these principles, the record, including the petition for removal, shows affirmatively that the case was not one arising under the laws of the United States. In substance,

the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto. In holding otherwise we think the learned Judge of the Circuit Court erred."

From an inspection of the petition filed in the Common Pleas Court, it will be seen no reference is made to the interstate character of the property, and it is not disputed that the State of Ohio is basing its action on the statutes of the State of Ohio, and not attempting to invoke any Federal law relating to interstate commerce. Nor can jurisdiction of such a cause be conferred on the Federal Court by allegations that defendant intends to assert a defense based on the Constitution or a law or a treaty of the United States or under statutes of the United States.

In the filed opinion of the Court below, at the top of page 9, the learned Judge says:

"So far as we see (the point has not been argued), the jurisdiction of the Court below to decide in that case (the suit brought by Swift & Company to enjoin Allen J. Seney from prosecuting the case at bar) this vital question of

constitutionality is unassailable and it would be a matter of little importance to anyone to order remand of this case to the State Court and yet to leave the jurisdiction of the Court below over the same controversy in the companion equity case unimpaired."

We respectfully submit that the injunction case referred to is simply ancillary to the case at bar and if the Federal District Court had no jurisdiction to entertain this action it then had no jurisdiction to entertain the injunction suit referred to, and that the questions of the constitutionality of the so-called Valentine Act and the Smith Cold Storage Act and the existence "of a federal question through a claim of unconstitutionality" are not properly before this court and do not require adjudication in passing upon the errors complained of in the petition presented in this Court. So far as we know, the Valentine Law and the Smith Cold Storage Law are valid enactments and until these laws are challenged in a proper proceeding in a proper tribunal their constitutionality cannot be questioned and it is our opinion that the Federal Court should not interfere by attempting to entertain jurisdiction as upon removal. Swift & Company had no right to challenge in the *Federal Courts*, by invoking the Fourteenth Amendment, the laws upon which this action was predicated and to all intents and purposes the laws of Ohio (meaning the statutes and decisions of the Supreme

Court of Ohio) designating the party plaintiff must prevail as the law of the land.

The Court below seems to have been confused by the decision of the Supreme Court of Ohio in the Columbus case. The Supreme Court of Ohio in that case said that the action was well brought and the relief asked for was granted. The instant case is "on all fours" with that case. "The constitutionality of the state law is (not) at stake in this case, although the Court below in its confusion seems not to recognize the difference between a constitutional or legislative denial of equal rights and a judicial interpretation thereof. The real question presented here is, *Who is the party plaintiff?* The Court below seems to point out that the Supreme Court of Ohio has said that the State of Ohio is that plaintiff, "but its conclusion rests on the premises that the law is valid." That is quite true and the validity of that law or laws cannot be challenged in the Federal Court in this action.

The opinion of the Circuit Court of Appeals is sophistical and, it must be confessed, most difficult to digest—let alone understand or answer, yet we firmly believe that The State of Ohio can enforce its own laws without the aid of the Federal judiciary except in those cases in which the Constitution of the United States is involved.

We submit the District Court never at any time

had jurisdiction of this case, and never had a right to assume jurisdiction thereof; that the motion to remand should have been granted, as the authorities already cited demonstrate, and any further assumed or attempted jurisdiction of said District Court was unwarranted, and any and all orders made by said Court after overruling said motion to remand, are null, void and of no effect whatsoever.

It is disclosed by the record that, by the order of the Court below, a bond in the sum of \$100,000.00 has been voluntarily given by Swift & Company to secure The State of Ohio in liquidated damages if it is finally determined there has been a violation of its penal statutes. Said Court recognizes that its "decision is subject to review" and although the relief sought at the time of the commencement of this action is beyond recall at this time, nevertheless that the peace and dignity of the State of Ohio may be preserved, and its penal laws enforced, seems to make it incumbent upon this Court to reverse the decision of the lower court and remand this cause to the State Court.

We respectfully submit in conclusion that the decree and order of the Circuit Court of Appeals in affirming the decree and order of said District Court should be reversed, set aside and held for naught, and that the order of said District Court refusing to remand this cause should be set aside, as well as all

orders made by said District Court after refusing to remand this case, and that said District Court be directed to remand this cause to the State Court—the Court of Common Pleas of Lucas County, Ohio, for further proceedings therein, and such other relief as appellant may be entitled to in the premises.

ROY R. STUART,
Prosecuting Attorney,
Lucas County, Ohio,

ALLEN J. SENEY,
Special Counsel,
Solicitors for Appellant.

Charles S. Northrup

1
October Term, 1911

THE BOARD OF TRUSTEES OF THE ALLEN J. SWIFT
FOUNDATION, INCORPORATED IN ILLINOIS
CHICAGO, ILL.

Appellees.

SWIFT & COMPANY AND THE AMERICAN
REINSURANCE COMPANY.

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF
APPEALS, NINTH CIRCUIT.

BRIEF ON BEHALF OF SWIFT & COMPANY
APPELLANTS, ON MOTION TO DISMISS APPEAL.

HARRISON & FRANK

Attorneys for Swift & Company

B. W. FRANK

Of Counsel.

IN THE
Supreme Court of the United States

No. 300.

OCTOBER TERM—1921.

**THE STATE OF OHIO EX REL. ALLEN J. SENEY,
PROSECUTING ATTORNEY OF LUCAS
COUNTY, OHIO,**

Appellant,

vs.

**SWIFT & COMPANY AND THE NORTHERN
REFRIGERATING COMPANY,**

Appellees.

**On Appeal from the United States Circuit Court of
Appeals, Sixth Circuit.**

**BRIEF ON BEHALF OF SWIFT & COMPANY
APPELLEE, ON MOTION TO DISMISS APPEAL.**

MARSHALL & FRASER,
Solicitors for Swift & Company

H. W. FRASER.
Of Counsel.

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Appellees.

**BRIEF ON BEHALF OF SWIFT & COMPANY,
APPELLEE, ON MOTION TO DISMISS APPEAL.**

STATEMENT OF FACTS.

This action was brought in the Common Pleas Court of Lucas County, Ohio, by Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, as appears by his petition in which the opening paragraph reads:

“Plaintiff for *his* cause of action herein says that he is the duly elected, qualified and acting Prosecuting Attorney of Lucas County, Ohio, and that *he* brings this action in his official capacity in behalf of the State of Ohio.”

The petition alleged that Swift & Company had stored a large quantity of whole pork carcasses and parts thereof with The Northern Refrigerating Company in Toledo for a longer time than the period of six months fixed by the Smith Cold Storage Act of Ohio, and that such storage was in pursuance of an agreement between the two defendants, Swift and Company and the storage company, to create and carry out certain restrictions of trade and commerce contrary to the provisions of the Valentine Anti-Trust Law. That by such agreement the defendant companies had created and were carrying out restrictions in trade and commerce and had caused said pork to be withdrawn from the usual and proper channels of trade and commerce and as a result had caused the price of similar pork products to be unlawfully increased. That unless restrained the defendants would create and carry out similar restrictions in trade and commerce, and unless restrained the storage company would deliver the pork to Swift & Company, and unless restrained Swift & Company would take the pork and sell or expose the same for sale within Lucas County, or elsewhere, contrary to law, and that unless restrained Swift & Company would continue to use the cold storage warehouse for the purpose of holding said pork for a longer period than that within which said products could be so held.

The petition further charged that in the event a restraining order was issued as prayed for, the defendants, Swift & Company and The Northern Refrigerating Company would defeat the purposes of the restraining order unless a receiver was appointed to take custody of the pork.

The prayer of the petition was for a restraining order enjoining The Northern Refrigerating Company from delivering the pork to Swift & Company and re-

straining the defendants from moving, changing or disposing of the pork in any manner, and for the appointment of a receiver to take custody of the pork until final decree and that the defendants be enjoined from further carrying out or carrying into effect any and all crimes or acts in restriction of trade and commerce, and for other relief.

Upon the filing of this petition on August 27, 1919, without notice to the defendants or either of them and notwithstanding both defendants for many years had maintained offices and places of business in Toledo, an injunction was granted as prayed for.

On the next day, without notice to either defendant, a receiver was appointed to seize the property and to take charge of and keep the pork until the further order of the court; and then for the first time the defendants were notified that they had been sued and enjoined and that a receiver had been appointed, and this notice came in the form of a seizure of the property by the receiver.

On August 30, 1919, the Prosecuting Attorney filed his written motion for an order authorizing the receiver to sell and dispose of the property of Swift & Company at the earliest possible date and in such manner as may be just and as the court may prescribe.

This motion for the sale of pork was set for September 3, 1919; in other words, the defendants were given three days' notice of a hearing to be held on September 3rd, although the summons issued against them notified them in accordance with the laws of Ohio that they had been sued in the Court of Common Pleas and unless they answered by September 27, 1919, the petition against them would be taken to be true and judgment would be rendered accordingly.

On September 2, 1919, Swift & Company filed its petition for removal to the Federal Court with proper

bond and served upon the Prosecuting Attorney the customary notice that the petition would be heard upon the day following.

The petition for removal was based upon three grounds:

1. Diversity of citizenship.

2. That the laws of the United States were involved, in that the pork referred to in the petition was in transit in interstate commerce, pursuant to and under authority of the methods sanctioned by the Interstate Commerce Commission, and hence, not subject to seizure in the Ohio courts, and further, the procedure adopted was a step in the taking of plaintiff's property without due process of law.

3. That the petitioner, Swift & Company, was denied or could not enforce in the judicial tribunals of the State of Ohio or of Lucas County rights secured to it and all persons within the jurisdiction of the United States, because certain courts of the State of Ohio have construed the Smith Act (Section 1155-1, General Code of Ohio) and the Valentine Anti-Trust Law (Sections 6400 *et seq.*, General Code of Ohio) of the State of Ohio, so as to authorize and permit the seizure of property without due process of law, and, further, to authorize the summary seizure and sale of property without hearing on the merits. (Transcript of Record, pages 12-16, inclusive.)

On September 3, 1919, Swift & Company appeared in court by its attorneys and upon the application of the Prosecuting Attorney the hearing on the petition for removal and the Prosecutor's motion to sell the pork were continued until September 5th.

On September 5th the parties again appeared and the Prosecutor stated to the Common Pleas Court that before any order was made on the petition for removal

he desired to dismiss the case without prejudice as to Swift & Company, and that notwithstanding such dismissal the receiver should continue in the custody of the property of Swift & Company.

Over the objection of Swift & Company the Common Pleas Court entered the order of dismissal and thereupon refused to act upon the petition for removal and immediately commenced what was claimed to be a hearing upon the Prosecutor's motion to sell the property of Swift & Company.

Swift & Company thereupon filed its bill in the United States District Court to enjoin the Prosecuting Attorney from proceeding further, and in due course on September 11, 1919, filed its transcript of proceedings in the United States District Court and had the same entered on the docket of said court.

Thereafter on September 12 the Prosecuting Attorney filed his motion to remand, and upon hearing held October 1, 1919, that motion was overruled, whereupon the Prosecutor attempted to appeal directly to the Supreme Court of the United States. This appeal was allowed by the district judge, but he very properly refused to sign a certificate, under Section 238 of the Judicial Code, as no final judgment had been rendered.

Swift & Company filed its answer and cross petition on September 12, 1919. (Record, pages 21-24.)

Swift & Company then filed in the District Court a motion to release the pork from custody, and during the hearing this motion was supplemented by a motion for judgment.

The testimony on behalf of Swift & Company in the District Court showed that no whole carcasses of pork had been stored at all, but only such parts of carcasses as are known as "green sow bellies" and that these were the subject matter of interstate commerce in that they

were stored in transit at Toledo under the through transit rate from Cleveland to Chicago and other points west thereof, until such time, not exceeding nine months from the date of storage, as it was possible to find room for them in the pickling plants of Swift & Company.

Original bills of lading covering this pork were offered in evidence and showed on their face the storage in transit.

The testimony further showed that in its then "green" state the pork was unfit for human consumption and was useful for no other purpose than to be made into bacon by the appropriate curing and smoking process, and that this large quantity of "green sow bellies" had accumulated by reason of contracts between Swift & Company and the United States Government for certain parts of pork, which compelled the accumulation and storage of these "green sow bellies" which the government did not acquire or contract for.

The testimony showed further without the slightest contradiction that no agreement or arrangement had ever been entered into between Swift & Company and The Northern Refrigerating Company to store this pork for the purpose of increasing the price thereof or for the purpose of causing any restrictions in trade or commerce whatsoever, or for the purpose of violating the Valentine Act in any respect or for the purpose of violating the Smith Cold Storage Act. The contract of storage was the usual one which entitles the bailor to return the property at any time upon the production of the storage receipts.

After testimony to the above effect had been taken the Prosecuting Attorney stated to the District Court that he desired to introduce evidence to controvert the testimony of witnesses in behalf of Swift & Company and he

was granted a continuance until October 6, 1919, for that purpose.

On October 6th the Prosecuting Attorney in open court declined to offer any evidence and announced that he intended to stand upon the removal question alone.

Upon the hearing before the District Court the petitioner admitted the fact to be that none of the pork held by the Receiver was ever offered, exposed or intended for sale within the State of Ohio, and he hence admitted that no offense against the Smith Cold Storage Act was ever contemplated or committed. (Record, p. 73.)

Upon the conclusion of the hearing in the District Court, judgment was entered for Swift & Company, and thereupon the Prosecuting Attorney took the case on appeal to the United States Circuit Court of Appeals for the Sixth Circuit, the assignment of errors in that court relating solely to jurisdictional questions. (Record, pages 51-53, inclusive.)

On January 17, 1921, the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, and on that day handed down an opinion in the case, in which the court found that the jurisdiction of the District Court could be and was sustained only upon the ground of diversity of citizenship, and that the other grounds assigned and invoked by Swift & Company in the petition for removal were without merit and created no jurisdiction. (Record, pages 96-104, inclusive.)

Thereafter the appellant made application to this court for a writ of *certiorari* in this cause, which was denied by this court on October 10, 1921.

ARGUMENT.

The Judgment of the Circuit Court of Appeals Was Final, as it Determined That Diversity of Citizenship was the Only Ground Existing for the Removal of the Case.

Upon the foregoing state of facts, as shown by the record, it is most respectfully submitted that this court has no jurisdiction to entertain or consider this appeal, in that, by the provisions of Section 128 of the Judicial Code,

“The judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states.”

The assignment of errors by the appellant is based solely upon questions of jurisdiction. (Record, pages 105, 106.)

His brief on the appeal makes no other contention.

So that the case stands thus: Did the petition for removal from the State Court to the United States District Court in this case properly invoke any ground of federal jurisdiction other than that of diversity of citizenship?

If it did not, even though it attempted to do so, then the judgment or decree of the United States Circuit Court of Appeals was final.

This court said in *Roman Catholic Church of St. Anthony of Padua of Jersey City vs. The Pennsylvania Railroad Company*, 237 U. S., 575, that:

“This court cannot review the judgment of the Circuit Court of Appeals when the complaint alleged diversity of citizenship, unless there remain in the complaint, if the averments of such diversity were disregarded, such averments as to existence of rights under the Constitution and laws of the

United States as are adequate to sustain jurisdiction.

"Inadequacy of averments in the bill to sustain jurisdiction under the Constitution and laws of the United States cannot be cured by showing that the nature and character of the act relied upon are sufficient to justify the implication that such constitution and laws were relied upon."

And in the case of *G. & C. Merriam Company vs. Syndicate Publishing Company*, 237 U. S., 618:

"In a case where diverse citizenship exists, the decree of the Circuit Court of Appeals is final unless in addition to the allegations of diverse citizenship, the bill contains averments of a cause of action, and consequent basis of jurisdiction, arising under the Constitution or laws of the United States.

"If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and averments as to a federal right are unsustainable and frivolous, or foreclosed by former adjudication of this court, the appeal from the judgment of the Circuit Court of Appeals must be dismissed."

Also in *City and County of Denver vs. New York Trust Company*, 229 U. S., 123:

"While the jurisdiction of the Circuit Court in a case where diverse citizenship exists may also rest upon the fact that the case is one arising under the Constitution of the United States, in which case there is an appeal from the judgment of the Circuit Court of Appeals, that is not the case where the alleged infractions of the Constitution are without color of merit, or are anticipatory of defendant's defense."

So that the question resolves itself into a simple consideration of the allegations of the original petition for removal and the adjudication of the Circuit Court of Appeals with respect to the same.

As to these the Circuit Court of Appeals found that jurisdiction existed on the ground of diversity of citizenship. (Record, page 102.)

As to the other grounds of removal, it held that they were not well taken; the court saying as follows (Record, pages 96, 97):

“Removal is sought to be upheld because: 1. The controversy is controlled by, and necessarily involves, the constitution or laws of the United States; 2. Defendant can not enforce, in the judicial tribunals of Ohio, its equal, civil rights as a citizen of the United States; 3. The parties are citizens of different states.

“1. The Laws of the United States.—It is said that these are involved in three ways: (a) the property was in transit in interstate commerce, pursuant to and under the authority of the methods sanctioned by the Interstate Commerce Commission, and, hence, was not subject to seizure in the Ohio courts; (b) the procedure initiated by petition was a step in the taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment; (c) the Lever Act, so-called, had, for the time of the war, superseded the Smith Cold Storage Act, and the case, therefore, called for application and construction of the Lever Act.

“It is enough to say of all these contentions that they present matters of defense, and that the suit or proceeding commenced by the petition plainly did not arise under the Interstate Commerce Act, or the Fourteenth Amendment, or the Lever Act. It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under Section 28 of the Judicial Code (*In re Winn*, 213 U. S., 458).

“2. Denial of Civil Rights.—Whether the situation, which defendant, by argument, undertakes to present on this subject, could in any event justify removal under Section 31 of the Judicial Code, we need not consider. The effort to support removal under this section is an afterthought.

The removal petition has only one allegation which is now claimed to be pertinent on this point. It is to the effect that "certain courts" of the State of Ohio have construed the statutes and laws of Ohio so as to permit the seizure and taking of plaintiff's property without due process of law, whereby 'petitioner will be unable to enforce its rights under the laws of the United States.' This comes very far short of the full and exact statement of deprivation of civil rights which would be necessary, if it could be thought that Section 31 has any reference to such a controversy as this (see *Iron Mountain Co. vs. Memphis*, 96 Fed., 113, 122; *Kentucky vs. Powers*, 201 U. S., 1)."

So the appellant was sustained by the United States Circuit Court of Appeals on all of his objections to the jurisdiction of the District Court, except the one as to the existence of diversity of citizenship.

His appeal, therefore, must be upon the sole ground that diversity of citizenship does not exist, for he cannot be permitted to assert here that the Circuit Court of Appeals was wrong in holding in his favor that federal jurisdiction did not attach on the other grounds alleged in the petition for removal—and thereby give this court jurisdiction; and then turn around and say that the Circuit Court of Appeals rightly decided those other questions and was wrong only as to the existence of diversity of citizenship.

His appeal can be here only upon matters decided adversely to him.

Sage vs. Central Railroad Co. of Iowa, 93
U. S., 412.

It follows that the judgment of the Circuit Court of Appeals was final as to him, and he cannot seek to review it in this court.

True, the Circuit Court of Appeals itself might have certified the question, had it seen fit, under Section 239

of the Judicial Code, but that was a matter within the discretion of that court, which it did not exercise.

Another method of review was open, under Section 240 of the Judicial Code, by petition of the appellant to this court for a writ of *certiorari*, but, as we have already shown, such petition was filed and this court declined to issue the writ.

As was pointed out in *Brown vs. Alton Water Company*, 222 U. S., 325:

“The Judiciary Act of 1891 affords, by one method or the other, an opportunity for review by this court of every judgment or decree of a lower court which the Judiciary Act contemplated should be reviewed by this court.”

So that the appellant is in no position to say that he has been or is denied a right of review.

His situation is simply that both this court and the Circuit Court of Appeals have already declined to further review this case in the ways provided by the appropriate statutes, and he now seeks such a review by a method expressly forbidden by Section 128 of the Judicial Code.

One test is this: What judgment could this court render in favor of the appellant, on the appeal if allowed?

It could only be, that the Circuit Court of Appeals was wrong in holding that diversity of citizenship existed.

But that is exactly what, as we understand the law, this court has no jurisdiction to pass upon or determine.

It matters not whether the grounds for the conclusion reached by the Circuit Court of Appeals in this behalf were correct or incorrect. We respectfully submit that this court has no jurisdiction to inquire into them. The substantive fact is that that court found no other ground of jurisdiction than diversity of citizenship, and its determination of that one question is final, whether right or wrong.

The Appeal Should Have Been Directly to This Court.

A further reason why this court has not jurisdiction of this appeal is disclosed by the record, as follows:

On September 2, 1919, Swift & Company filed its petition for removal to the Federal Court, with proper bond and notice. On September 11, 1919, it filed its transcript of proceedings in the United States District Court, and had the same entered on the docket of said court. On September 12, 1919, it filed its answer and cross petition in the District Court. (Record, pages 12-19, 21-25.)

On September 17, 1919, the appellant filed his motion to remand the cause to the State Court, which was overruled on October 1, 1919. (Record, pages 26, 27.)

At that stage of the proceedings the appellant undertook to appeal the cause to this court on the ground of lack of jurisdiction. (Record, pages 28-33.)

The United States District Court, however, refused to grant a certificate respecting jurisdiction, under Section 238 of the Judicial Code, for the reasons set forth in a memorandum of opinion filed that day, October 18, 1919 (Record, pages 34-36), namely, that such certificate can only be had and the case so appealed direct to this court after final judgment, as a case cannot be brought to this court by piecemeal.

McLish vs. Roff, 141 U. S., 661.

Keatley vs. Furey, 226 U. S., 399.

Thereafter the case was heard upon the merits and final judgment rendered.

At that point the appellant had an election between two remedies: He might either cause the case then to be certified on appeal, under Section 238 of the Judicial

Code, direct to this court, or appeal it to the Circuit Court of Appeals on the merits.

U. S. vs. Jahn, 155 U. S., 109.

Boise Artesian Hot & Cold Water Company, Ltd., vs. Boise City, 230 U. S., 98.

But he could not do both.

Having chosen to go to the Circuit Court of Appeals, that court might have certified the question of jurisdiction to this court, had it desired, or it could—as it did—decide the jurisdiction along with the other questions in the case.

But where, as here, the jurisdiction of the District Court is founded solely upon diversity of citizenship—being so determined by the Circuit Court of Appeals—no appeal will lie to this court.

The assignment of errors in this court shows that the appellant has attempted to bring the case up now solely on the question of jurisdiction. (Record, pages 105, 106.)

We earnestly submit that this cannot be done.

For the foregoing reasons it is respectfully urged that this motion should be allowed and the appeal dismissed.

Most respectfully submitted,

H. W. FRASER,

MARSHALL & FRASER,

Solicitors for Swift & Company.

H. W. FRASER.

Of Counsel.